U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 09508472

Date: JUN. 07, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a business owner and entrepreneur, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner's proposed endeavor was of national importance, and therefore failed to show his eligibility for a national interest waiver. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider, both of which the Director found to meet the respective requirements for the filing of a motion.[1]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

[1] We note that in reviewing the Petitioner's motion to reopen, the Director applied the standard at 8 C.F.R. § 1003.2(c), which is applicable to motions before the Board of Immigration Appeals and requires that evidence accompanying the motion "was not available and could not have been discovered or presented at the former hearing." The applicable regulation concerning motions to reopen in this case is 8 C.F.R. § 103.5(a)(2). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge, and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

As acknowledged in the Director's decision, the record demonstrates that the Petitioner qualifies as a member of the professions holding an advanced degree.[4] The sole issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

The Petitioner did not initially provide details regarding his proposed endeavor in the United States, but indicated on Form I-140 that his proposed employment would be as a chief executive, and that in this role he would "plan, direct or coordinate operational activities at the highest level of management with the help of subordinates." He also submitted information about [redacted], a [redacted] manufacturing and sales business he owned and ran since 2007, and articles about entrepreneurship in the United States. In response to the Director's request for evidence (RFE), the Petitioner submitted a business plan and registration documents concerning [redacted], a Florida company he established in 2018, as well as a letter from [redacted] a professor at [redacted] University, who provides his evaluation of the Petitioner's eligibility for the requested immigration benefit. After reviewing the evidence, the Director concluded that while the Petitioner had established that his proposed endeavor as an entrepreneur and administrator in business has substantial merit, and that he was well positioned to advance that endeavor, he had not established that this endeavor was of national importance. Therefore, the Director concluded that he was not eligible for a national interest waiver.

In his combined motion to reopen and reconsider, the Petitioner asserted that the Director failed to give consideration to the letter from [redacted], which he indicated was submitted to establish his eligibility for a national interest waiver. He also submitted several invoices and receipts, as well as photographs, related to [redacted] without explaining how this evidence supported his eligibility for a national interest waiver. As noted above, the Director's decision did not consider this evidence to be "new," and noted that [redacted]'s letter was considered and discussed in his previous decision.

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[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] The Petitioner submitted copies of his diploma and transcripts from [redacted] University in [redacted], which indicate that he earned a bachelor's degree in business administration in 2007. An academic evaluation report confirms that this four-year degree is equivalent to a bachelor's degree in business administration issued by a college or university in the United States. The record also includes evidence that the Petitioner gained at least five years of progressive experience after he earned this degree as the owner and president of his boat-building business, [redacted]

On appeal, the Petitioner states that the Director's decision on his combined motion "was done in error," but does not further explain why his motions to reopen and reconsider should have been granted. Instead, he goes through the three prongs of the *Dhanasar* framework and argues that the evidence in the record supports his eligibility. In asserting that his proposed endeavor is of national importance, he initially states that the Director erred in stating that his proposed endeavor is to "start in the [redacted] industry," and that his actual proposal is to "provide exceptional Business Administration skills to the [redacted] industry." However, we note that the record consists of evidence related solely to the founding, operation and growth of [redacted], and there is no indication that the Petitioner's "expertise, skills, know how, and entrepreneurship" would be applied to companies other than [redacted] or its potential business partners.

The Petitioner next refers to letters from companies that have worked with him in [redacted] and in the United States, and specifically refers to a letter from [redacted] of [redacted]. This letter, which was submitted with the Petitioner's motion to reopen, indicates that [redacted] has created a joint venture with [redacted] and that they have already been coming up with "new and innovative ideas," such as a [redacted] designed with accessibility for the disabled. He also states that this joint venture will create jobs, impact other small businesses in the area "to do certain things that we cannot do in house," and contribute tax revenue.

As an initial matter, we note that the joint venture agreement between [redacted] and [redacted] was signed on April 20, 2019, ten months after the Petitioner filed this petition. Eligibility for a requested immigration benefit must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Even if we were to consider this joint venture agreement as evidence of the proposed endeavor's national importance, it does not add sufficient information to the record to support that claim. The *Dhanasar* decision states that an endeavor may have national importance if it has "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area…" Here, neither [redacted]'s letter nor the business plan for [redacted] provides information regarding the number of employees that will be employed, either directly or indirectly, as a result of the operation of this business. [redacted] states that the business is located "in an industrial area where there is low income housing," but the record does not include any supporting information regarding economic conditions in the area, and neither he nor the Petitioner suggest that they would focus on hiring individuals from an economically depressed area. In addition, [redacted]'s letter speaks only generally about the benefits and economic impact of entrepreneurialism and [redacted] in general. Our analysis under the first prong focuses on the potential prospective impact of the Petitioner's specific proposed endeavor, and in this case the evidence does not establish that there is significant potential to employ U.S. workers.

As for other substantial positive economic effects, [redacted]'s letter mentions that the proposed endeavor will also require other small business to perform services for the joint venture between his company and [redacted] but again there is no supporting information in the record to demonstrate

the significance of this impact. Also, the Petitioner's business plan for [redacted] initially projects revenues of $1.8 million based upon the production and sale of [redacted] in the company's first year, with a net profit of 35%, or $630,000. Later in the document, he indicates that after selling some [redacted] the company would then begin making and selling [redacted] which would generate higher profits of 55% and result in a $2.5 million profit in the first year. However, beyond the discrepancy in these figures and the lack of evidence to support them, the Petitioner has not established that this level of revenue, or the taxes resulting from it, would present a substantial economic effect.

Other potential positive effects of the proposed endeavor mentioned in the business plan and the letter from [redacted] include a "side overhead door" which the Petitioner claims is a unique feature of his [redacted] which would provide easier access to the [redacted] especially for the elderly and disabled. And, as noted in the Director's decision, the Petitioner makes a brief reference to developing [redacted] "that are strongly linked to sustainability and are free from pollution." The *Dhanasar* decision notes that national importance may be shown when an endeavor has national implications within a field, "such as those resulting from certain improved manufacturing processes or medical advances." However, in this case, neither of these brief statements is supported by evidence showing how these design elements in the [redacted] produced by the Petitioner's company would have broader implications, to the [redacted] ndustry or the field of business, beyond the clients who would purchase these [redacted]

Based upon our review of the record and in accord with the analysis provided above, we agree with the Director's conclusion that the Petitioner has not established that his proposed endeavor of founding and leading a [redacted] manufacturer is of national importance, and that he therefore has not met the first prong of the *Dhanasar* framework. We also agree that the Petitioner is well-positioned to advance his proposed endeavor, due to his past experience in owning and operating a similar company in [redacted] and the interest of business partners and potential clients.

As explained above, the third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. Here, the Petitioner again refers to the letter from [redacted] who writes that "there are substantial economic benefits for the United States associated with waiving the job offer and labor certification requirements..." However, this statement does not explain why a waiver of those requirements is necessary to enable the Petitioner to pursue his endeavor, nor does [redacted] indicate why the "business development and investment opportunities" he asserts are associated with the Petitioner's endeavor outweigh the national interest in protection of the domestic labor force. In any case, as the Petitioner has not established that his proposed endeavor is of national importance, he is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established that he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.